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No. 80-1858

In the Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF PENN YAN, NEW YORK, ET AL., PETITIONERS

v.

NEW YORK STATE ELECTRIC & GAS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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Petitioners seek review of the court of appeals' determination that the Federal Energy Regulatory Commission must conduct a hearing under Sections 211 and 212 of the Federal Power Act, 16 U.S.C. (Supp. III) 824j and 824k,[1] before the Commission may enlarge the scope of a utility's preexisting voluntary commitment to "wheel"[2] electric power.

1. Petitioner, the Village of Penn Yan, is a New York municipality that owns and operates a municipal electric system. To provide retail electric service to its customers, Penn Yan purchases hydroelectric power from the Niagara

[1]These statutes are set forth at Pet. App. 2a-8a.

[2]"Wheeling" is a transfer of electric power by direct transmission or displacement from one utility to another over the facilities of an intermediate utility. See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 368 (1973).

Project operated by the Power Authority of the State of New York ("PASNY"). PASNY power is "wheeled" to Penn Yan through the interstate transmission facilities of an investor-owned utility, New York State Electric & Gas Corporation ("NYSEG"). NYSEG's obligation to wheel PASNY power for Penn Yan is contained in two contracts. These contracts are subject to the jurisdiction of the Commission under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. (& Supp. III) 824d and 824e. Both contracts contain provisions that limit Penn Yan's use of power wheeled by NYSEG to retail service within the Village boundaries as they existed on February 10, 1961 (Pet. App. 5b-7b).

In 1967, Penn Yan annexed territory outside its 1961 municipal borders. In an effort to provide electric service to residents in the annexed territory, Penn Yan filed with the Commission a petition for a declaratory order, requesting that the Commission invalidate the contractual provisions which restrict the Village's use of the PASNY power, wheeled by NYSEG, to the Village's preexisting boundaries (Pet. App. 7b-8b).

On the basis of the pleadings, the Commission issued a declaratory order (Pet. App. 1d-10d) that the wheeling provisions were unenforceable, finding that they were anti-competitive and served no countervailing public interest objective, and that they were unjust and unreasonable terms and conditions of an agreement subject to the Commission's jurisdiction. The Commission further determined that its ruling did not result in an order compelling wheeling; rather, in the Commission's view, by rendering the restrictive provisions unenforceable, the Commission simply removed a restriction on the use of power that NYSEG had already agreed to wheel (*id.* at 9d). As it pointed out, "[b]y eliminating the restrictive provisions, we are eliminating the restrictions on the use of the wheeled

power rather than 'compelling wheeling' " (*ibid.*). The Commission affirmed its ruling on application for rehearing (Pet. App. 1e-9e).

The court of appeals affirmed in part and vacated and remanded in part (Pet. App. 1b-37b). The court rejected the Commission's determination that the undisputed facts contained in the pleadings provided a sufficient record to justify modification of the contracts (*id.* at 25b-27b). While recognizing that NYSEG's pleadings demonstrated that one purpose of including the restrictive provisions was to protect itself from competition, the court noted that NYSEG's petition also alleged that the challenged contractual restraints were in the public interest. The court held that a determination with regard to the public interest allegation should not have been made without an evidentiary hearing under Section 206 of the Act to determine, *inter alia*, "the probable impact of the proposed modification on NYSEG, the possible inefficiency in duplicating service, [and] the extent, if any, to which NYSEG might be entitled to a 'settlement' " as a result of the proposed modification (*id.* at 26b-27b).

A majority of the panel also concluded (Pet. App. 27b-34b) that the Commission's modification of the contracts amounted to an order requiring wheeling and should have been preceded by findings and a hearing under Sections 211 and 212 of the Federal Power Act, 16 U.S.C. (Supp. III) 824j and 824k. The court ruled that, while the statutory provisions do not, on their face, resolve the issue, the purpose and history of Sections 211 and 212 demonstrate that those sections were intended to apply to Commission orders that would expand a voluntary commitment to wheel (Pet. App. 29b). In the majority's view, to permit the Commission to modify the contracts in a manner that expanded NYSEG's voluntary agreement to wheel, without requiring

the Commission to conduct a hearing and make certain findings as provided in Sections 211 and 212, would be inconsistent with the intent of Congress (Pet. App. 33b).

District Judge Goettel dissented from this portion of the court's opinion (Pet. App. 34b-37b). In his view, the Commission's action, which requires NYSEG to wheel power for an additional 27 customers in Excell Estates, has "a *de minimis* effect on the amount of power wheeled to Penn Yan" (*id.* at 36b). Under these circumstances, Judge Goettel would not require the Commission to comply with Sections 211 and 212 before modifying the wheeling agreement. However, because PASNY had requested a hearing under Section 206 of the Act, and because the Commission's action affects NYSEG's obligation to wheel to other municipalities named in the PASNY/NYSEG contract, Judge Goettel would have remanded the case for a hearing under Section 206 (Pet. App. 36b-37b).

2. To be sure, the question whether the Commission is empowered to enlarge upon a preexisting wheeling obligation without following the procedures added to the Federal Power Act by the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3136-3140, is an issue of some importance to the regulation of electric power transmission. We submit, however, that this case is not an appropriate vehicle to decide that question.

To begin with, the case is in an interlocutory posture, a factor that ordinarily militates against review on certiorari. See R. Stern & E. Gressman, *Supreme Court Practice* 300-301 (5th ed. 1978). Before deciding that the procedures provided for in Sections 211 and 212 of the Federal Power Act were applicable here, the court of appeals held that the Commission should have held a hearing under Section 206 of the Act to determine whether the challenged contractual restraints were in the public interest (Pet. App. 25b-27b). Thus, regardless of whether the court below was correct

in its interpretation of Sections 211 and 212 of the Act, the case must be remanded to the Commission in any event for further proceedings under Section 206. If, following that hearing, the Commission concludes that the "contractual restraints were in the public interest," as asserted by NYSEG (Pet. App. 25b), it would have no occasion to reach the Sections 211 and 212 wheeling controversy.

Moreover, no other circuit has yet dealt with the nature of the Commission's obligations under the new statutory provisions.[3] Furthermore, the instant controversy involves the transmission of electric power for fewer than 30 homeowners, a factor which led one of the three judges below to view the Commission's order as having a *de minimis* effect (Pet. App. 36b). In light of these factors, we believe that the Court should await further developments before deciding to review the issue presented here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[3]Cases such as *Central Iowa Power Cooperative* v. *FERC*, 606 F. 2d 1156 (D.C. Cir. 1979), and *Richmond Power & Light* v. *FERC*, 574 F. 2d 610 (D.C. Cir. 1978), were decided without reference to the 1978 amendments to the Act. The issue has been raised in a case that is currently pending before the Fifth Circuit, *Florida Power & Light Co.* v. *FERC*, No. 80-5259.

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